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# PACE ENVIRONMENTAL LITIGATION CLINIC, INC.

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April 20, 2018

**Via Certified Mail, Return Receipt Requested**

Arctic Glacier, Inc.  
Attn: Environmental Manager or Supervisor  
225 Lake Street  
Newburgh, NY 12550

Re: Notice of Violation and Intent to File Suit under the Clean Water Act

Dear Sir or Madam,

We are writing on behalf of our client, Riverkeeper, Inc.,<sup>1</sup> ("Notifier") to notify you of our intent to file suit against Arctic Glacier pursuant to section 505(a) of the federal Clean Water Act ("CWA").<sup>2</sup>

Riverkeeper intends to file suit, as an organization and on behalf of its adversely affected members, in the United States District Court for the Southern District of New York seeking appropriate equitable relief, civil penalties, attorneys' fees, and other relief no earlier than sixty (60) days from the postmark date of this letter.<sup>3</sup>

We intend to take legal action because Arctic Glacier is discharging polluted stormwater from Arctic Glacier's facility at 225 Lake Street, Newburgh, New York 12550 ("the Facility") to the

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<sup>1</sup> Riverkeeper, Inc. is a not-for-profit environmental organization existing under the laws of the state of New York, headquartered in Ossining, New York. Riverkeeper's mission includes safeguarding the environmental, recreational and commercial integrity of the Hudson River and its ecosystem, as well as the watersheds that provide New York City with its drinking water. Riverkeeper was originally founded by the Hudson River Fisherman's Association, a group of fishermen concerned about the ecological state of the Hudson River, and the effect of its polluted and degraded condition on fish. Riverkeeper achieves its mission through public education, advocacy for sound public policies, and participation in legal and administrative forums. Riverkeeper has more than 3,000 members, many of whom reside near, use, and enjoy the Hudson River and its tributaries - waters that are polluted by industrial stormwater runoff.

<sup>2</sup> 33 U.S.C. § 1365(a). We refer to statutory provisions by their section in the Clean Water Act and provide the parallel citation to the United States Code only on first reference.

<sup>3</sup> See 40 C.F.R. § 135.2(a)(3)(c) (notice of intent to file suit is deemed to have been served on the postmark date).

waters of the United States without a permit in violation of sections 301(a) and 402(p)(2)(B) of the Clean Water Act.<sup>4</sup> Further, Arctic Glacier has not applied for coverage under, nor complied with the conditions of, an individual State Pollutant Discharge Elimination System (“SPDES”) permit or the General Permit for the Discharge of Stormwater Associated with Industrial Activity (“General Permit”)<sup>5</sup> issued by the New York State Department of Environmental Conservation (“DEC”), in violation of section 402(p) of the CWA, and 40 C.F.R. sections 122.26(c)(1) and (e)(1).

## I.

### BACKGROUND

With every rainfall event, hundreds of millions of gallons of polluted rainwater pour into the Hudson River and other receiving waters. The scale of this impact on water bodies is significant – for example, agencies and water quality specialists agree that stormwater<sup>6</sup> pollution accounts for more than half of the total pollution entering the marine environment each year.

DEC has designated more than 6,000 river miles, 319,000 acres of larger waterbodies, 900 square miles of bays and estuaries, and 592 miles of Great Lakes shoreline in the State as “impaired,” or not meeting water quality standards, and unable to support beneficial uses such as fish habitat and water contact recreation.<sup>7</sup> For the overwhelming majority of water bodies listed as impaired, stormwater runoff is cited as a primary source of the pollutants causing the impairment. Contaminated stormwater discharges can and must be controlled in order to improve the quality and health of these waterbodies.

Stormwater discharges flow from the Facility directly into the ponds at Little Falls Park or Muchattaoes Lake, which then flow into Quassaic Creek, or directly into the Quassaic Creek. The Quassaic Creek flows eastward into the Hudson River. DEC has classified the ponds at Little Falls Park, Muchattaoes Lake, and the relevant segments of Quassaic Creek as a Class C waterbody.<sup>8</sup> Under New York’s Water Quality Standards, “[t]he best usage of Class C waters is fishing. These waters shall be suitable for fish, shellfish and wildlife propagation and survival. The water quality shall be suitable for primary and secondary contact recreation, although other

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<sup>4</sup> 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

<sup>5</sup> New York State Department of Environmental Conservation, *SPDES Multi-Sector General Permit For Stormwater Discharges Associated With Industrial Activity*, Permit No. GP-0-17-004, (hereinafter “General Permit”), available at <http://www.dec.ny.gov/chemical/9009.html> (last visited Mar. 7, 2018). This General Permit replaces earlier general permits for the discharge of stormwater associated with industrial activity. It became effective on March 1, 2018, and will expire on February 28, 2023.

<sup>6</sup> Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt. See 40 C.F.R. § 122.26(b)(13).

<sup>7</sup> See EPA, New York Water Quality Assessment Report, [https://ofmpub.epa.gov/waters10/attains\\_state.control?p\\_state=NY#total\\_assessed\\_waters](https://ofmpub.epa.gov/waters10/attains_state.control?p_state=NY#total_assessed_waters) (last visited Mar. 7, 2018).

<sup>8</sup> See 6 N.Y.C.R.R. § 862.6. See also New York State Department of Environmental Conservation, *Environmental Resource Mapper*, <http://www.dec.ny.gov/gis/erm/>.



factors may limit the use for these purposes.”<sup>9</sup> Where the Quassaic Creek feeds into the Hudson River, the Hudson River is classified as a Class B waterbody.<sup>10</sup> Under New York’s Water Quality Standards, “[t]he best usages of Class B waters are primary and secondary contact recreation and fishing. These waters shall be suitable for fish, shellfish, and wildlife propagation and survival.”<sup>11</sup> The New York Water Quality Standards set numeric and narrative criteria for different water pollution parameters including dissolved oxygen, oil and grease, suspended and settleable solids, bacteria (pathogens), pH, temperature, nutrients, and others. A waterbody must meet these numeric and narrative criteria in order to support its designated uses.<sup>12</sup>

## II.

### **STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED AND ACTIVITIES ALLEGED TO BE VIOLATIONS**

#### A. Arctic Glacier Is Discharging Stormwater Associated with Industrial Activity to Waters of the United States without a Permit.

The CWA prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid SPDES permit.<sup>13</sup> Arctic Glacier’s industrial activity at the Facility has caused and continues to cause a “discharge of pollutants” within the meaning of section 502(12) of the CWA<sup>14</sup> and a “stormwater discharge associated with industrial activity” within the meaning of 40 C.F.R. section 122.26(b)(14) from the Facility on at least each and every day that there has been a rain event of more than 0.1 inches.<sup>15</sup>

Arctic Glacier’s activities at the Facility include, but are not limited to, the manufacturing of ice for sale. In carrying out these activities at the Facility, Arctic Glacier stores and handles materials in a manner that exposes them to precipitation and snowmelt.<sup>16</sup> Piles of crates and other debris are stored outside the Facility on both the north and south ends and are exposed to precipitation.

In particular, raw material unloading and product loading can result in the exposure of pollutants to precipitation due to container defects (bags, drums, bottles, or crates), spills and leaks during unloading and loading, failed connections (hoses and couplings), and the washdown of the unloading and loading area. Liquid storage containers, such as above ground storage tanks, can produce pollutants due to failed piping and connections (couplings, flanges, hoses, or valves),

<sup>9</sup> See 6 N.Y.C.R.R. § 701.8.

<sup>10</sup> See 6 N.Y.C.R.R. § 862.6. See also New York State Department of Environmental Conservation, *Environmental Resource Mapper*, <http://www.dec.ny.gov/gis/erm/>.

<sup>11</sup> See 6 N.Y.C.R.R. § 701.7.

<sup>12</sup> See 6 N.Y.C.R.R. §§ 702, 703.

<sup>13</sup> See CWA §§ 301(a), 402.

<sup>14</sup> 33 U.S.C. § 1362(12).

<sup>15</sup> EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity. See, e.g., 40 C.F.R. § 122.26(c)(i)(E)(6) (using 0.1 inches as the distinguishing threshold of a storm event).

<sup>16</sup> See EPA, Industrial Stormwater Fact Sheet Series, Sector U: Food and Kindred Products Facilities, available at <https://www.epa.gov/npdes/industrial-stormwater-fact-sheet-series> (last visited Mar. 7, 2018).

external corrosion and structural failure, and spills and overflows due to operator error. Other liquid storage container, such as drums, carboys, and gallon jugs, may produce pollutants when stored outside, left open, and through external corrosion, operator handling and transport, and spills and leaks from damaged containers. Solid storage containers may produce dust and particulates, and may release pollutants through operating handling and transport or spills and leaks. Other sources of pollutants from activities at this Facility include: air emissions, solid waste, spent equipment and scraps, wastewater, and pest control.

In addition, machinery on the site may release fuel, oil, lubricants, PCBs, PAHs, an array of metals, pH-affecting substances, and chemical residue. These toxic pollutants are often generated in the form of small particulate matter, which settles on the ground and other surfaces that are exposed to stormwater and non-stormwater flows. Also, vehicles at the Facility may expose many other pollutants to the elements, including gasoline, diesel fuel, anti-freeze, and hydraulic fluids.

Because Arctic Glacier fails to adequately shelter and otherwise contain these materials to prevent their release to the environment, precipitation falls on and flows over exposed materials, fluids, and particulates. Polluted stormwater discharges flow into the Quassaic Creek, which is a "water of the United States," as defined in 40 C.F.R. section 122.2 and, therefore, a "navigable water" as defined in section 502(7) of the CWA. Arctic Glacier does not have a SPDES permit for these discharges of pollutants. Thus, Arctic Glacier is discharging polluted industrial stormwater into navigable waters of the United States without the permit required under sections 301 and 402 of the CWA.

B. Arctic Glacier is Violating the Clean Water Act by Failing to Apply for SPDES Permit Coverage.

Arctic Glacier is engaged in the business of manufacturing ice for sale and therefore is an industrial discharger engaged in "Manufactured Ice" under Standard Industrial Classification ("SIC") Code 2097. This is an industrial activity included in Sector U of the General Permit. This industrial activity is the primary industrial activity of Arctic Glacier.

Pursuant to section 402(p) of the CWA and regulations promulgated by EPA pursuant to the CWA, Arctic Glacier must apply for coverage under the General Permit or an individual SPDES permit for Arctic Glacier's discharge of polluted stormwater. The General Permit is applicable to Arctic Glacier because: 1) Arctic Glacier's activities under SIC code 2097 are industrial activities as defined by 40 C.F.R. section 122.26(b)(14)(xi); 2) Arctic Glacier's primary industrial activity is described by SIC code 2097, which is listed in Appendix B of the General Permit; and 3) Arctic Glacier has stormwater discharges to surface waters of the State from a point source.

In addition, Arctic Glacier must apply for an individual SPDES permit if the Facility is discharging process wastewater, or has any other non-stormwater discharge containing pollutants that is not authorized by the General Permit. By failing to apply for coverage under the General



Permit or an individual permit, Arctic Glacier is violating CWA sections 301(a) and 402(a) and (p), and 40 C.F.R. sections 122.26(c)(1) and (e)(1).<sup>17</sup>

To be eligible to discharge under the General Permit, Arctic Glacier must submit to DEC a registration form called a “Notice of Intent.”<sup>18</sup> Notice of Intent forms are available online from DEC and may be submitted by mail or electronically using DEC’s E-NOI.<sup>19</sup> To register, Arctic Glacier is required, among other things, to list all stormwater discharges, including descriptions of the industrial activities taking place in the drainage area of each discharge and the acreage of industrial activity exposed to stormwater, the separate storm sewer system or immediate surface water body or wetland to which site runoff discharges, and the name of the watershed and nearest waterbody to which the site ultimately discharges and information about whether the receiving waters are impaired.<sup>20</sup> Arctic Glacier has failed to prepare and file a Notice of Intent or an application for an individual permit.<sup>21</sup>

C. Arctic Glacier is Violating the Clean Water Act by Failing to Comply with the General Permit.

As a discharger of stormwater associated with industrial activity, Arctic Glacier must comply at all times with the requirements of the General Permit (or an individual permit).<sup>22</sup> By discharging stormwater associated with industrial activity without complying with the General Permit, Arctic Glacier is violating CWA sections 301(a) and 402(a) and (p).<sup>23</sup> The main General Permit requirements that Arctic Glacier has failed and continues to fail to meet are explained further below.

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<sup>17</sup> Sections 301(a) and 402(a) and (p) make it unlawful for Arctic Glacier to discharge stormwater associated with industrial activity without obtaining a SPDES permit. 40 C.F.R. sections 122.26(c)(1) and (e)(1) require Arctic Glacier to apply for a SPDES permit that covers Arctic Glacier’s discharge of stormwater associated with industrial activity.

<sup>18</sup> See General Permit, Part I.D.2. In notifying Arctic Glacier that the Clean Water Act requires coverage under and compliance with a valid SPDES permit in order to lawfully discharge, and that submission of a Notice of Intent to DEC is required in order to obtain coverage under the General Permit, Riverkeeper does not concede that all of the activities conducted at the Facility are necessarily eligible for coverage under that permit. For example, if the Facility is discharging process wastewater, such as wash water, or has any other polluted non-stormwater discharge that is not authorized by the General Permit, then an individual SPDES permit is required and the failure to obtain and comply with an individual SPDES permit for such discharges also violates CWA §§ 301(a) and 402(p). The conditions for eligibility to discharge under the General Permit are provided in Part I.C of the permit.

<sup>19</sup> See [http://www.dec.ny.gov/docs/water\\_pdf/msgp017004noiinstr.pdf](http://www.dec.ny.gov/docs/water_pdf/msgp017004noiinstr.pdf).

<sup>20</sup> *Id.*

<sup>21</sup> A thorough search of EPA’s Enforcement & Compliance History Online (“ECHO”) database and DEC’s records reveals that no Notice of Intent has been submitted for the Facility.

<sup>22</sup> This section discusses the compliance requirements of the General Permit. If Arctic Glacier elects to seek coverage under an individual SPDES permit instead, the conditions of that individual permit will be at least as strict as those of the General Permit, thus Arctic Glacier will still be required to comply with all of the following.

<sup>23</sup> Sections 301(a) and 402(a) and (p) make it unlawful for Arctic Glacier to discharge stormwater associated with industrial activity without first complying with all of the conditions established in a SPDES permit.

1. Arctic Glacier has not developed and implemented a Stormwater Pollution Prevention Plan.

Before submitting a Notice of Intent, Arctic Glacier must prepare, make available, and implement a Stormwater Pollution Prevention Plan ("SWPPP") in accordance with schedules established in the General Permit.<sup>24</sup> The SWPPP must identify potential sources of pollution that may affect the quality of stormwater discharges associated with industrial activity. Further, the SWPPP must describe and ensure the implementation of practices that minimize the discharge of pollutants in these discharges and that assure compliance with the other terms and conditions of the General Permit, including achievement of effluent limitations.<sup>25</sup>

Among other things, the SWPPP must include: a general site description, a general location map identifying the location of the facility and all receiving waters to which stormwater discharges, information related to a company stormwater pollution prevention team, a summary of potential pollutant sources, a description of control measures and best management practices, and schedules and procedures for implementation of control measures, monitoring and inspections.<sup>26</sup>

Arctic Glacier has not developed and implemented a legally compliant SWPPP, as required by Part I.D.1 of the General Permit.<sup>27</sup>

2. Arctic Glacier has not implemented control measures and Best Management Practices that meet the best available technology standards.

Arctic Glacier cannot legally discharge stormwater under the General Permit until Arctic Glacier implements mandatory general and sector-specific control measures called Best Management Practices ("BMPs") in order to minimize the discharge of pollutants from the Facility.<sup>28</sup> The selected measures must reduce the discharge of pollution from the Facility to the extent practicable through use of the best available technology for the industry.

The General Permit requires that effluent limits be met in order to "minimize the discharge of pollutants. The term 'minimize' means reduce and/or eliminate to the extent achievable using control measures (including Best Management Practices . . . ) that are technologically available and economically practicable and achievable in light of best industry practice."<sup>29</sup> The General Permit's effluent limits include both numeric limits specific to certain sectors,<sup>30</sup> as well as non-numeric technology-based effluent limits that apply to all facilities.<sup>31</sup> These non-numeric

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<sup>24</sup> See General Permit Part I.D.1.

<sup>25</sup> See General Permit Part III.A.

<sup>26</sup> See General Permit Part III.A.

<sup>27</sup> We believe no SWPPP exists. If a SWPPP exists, then it is either facially inadequate or has not been fully and adequately implemented.

<sup>28</sup> See General Permit Part II, see also Part VII (setting forth sector-specific control measures and practices).

<sup>29</sup> General Permit Part II; see also Part III.C.7 ("The SWPPP must document in writing the location and type of BMPs installed and implemented at the facility to achieve the non-numeric effluent limits in Part II.A and where applicable in Part VII, and the sector specific numeric effluent limitations in Part VII.").

<sup>30</sup> See General Permit, Part VII.

<sup>31</sup> See General Permit, Part II.A.



technology-based restrictions include minimizing the exposure of pollutants to stormwater<sup>32</sup> and minimizing the discharge of pollutants in stormwater.<sup>33</sup>

Arctic Glacier has not minimized the discharge of pollution to the extent achievable by implementing control measures or BMPs that are technologically achievable and economically practicable and achievable in light of best industry practice, as required by Parts II and VII of the General Permit.

3. Arctic Glacier has not conducted routine site inspections and complied with monitoring, recordkeeping, and reporting requirements.

Arctic Glacier must conduct an annual comprehensive site inspection and evaluation of areas where industrial materials or activities are exposed to precipitation or where spills and leaks have occurred within the past three years.<sup>34</sup> The inspection must ensure that all stormwater discharges are adequately controlled and that all BMPs are functioning as expected.<sup>35</sup> Records of this inspection must be kept for five years.<sup>36</sup>

In addition, qualified facility personnel must carry out routine inspections at least quarterly.<sup>37</sup> During these inspections, personnel must evaluate conditions and maintenance needs of stormwater management devices, evaluate the performance of the existing stormwater BMPs described in the SWPPP, and document any deficiencies in the implementation and/or adequacy of the SWPPP.<sup>38</sup> Such deficiencies must then be addressed through corrective actions.

The General Permit also requires that all covered facilities conduct multiple types of analytical monitoring, and DEC may require additional individualized monitoring as well.<sup>39</sup> In particular, all facilities authorized under the General Permit must:

- Collect and analyze stormwater samples for each outfall at least semi-annually;<sup>40</sup>
- Conduct visual monitoring of stormwater discharges at least quarterly;<sup>41</sup>
- Perform an annual dry weather inspection to detect non-stormwater discharges;<sup>42</sup>
- Inspect, sample and monitor discharges from coal pile runoff;<sup>43</sup>
- Inspect, sample and monitor discharges from secondary containment structures and transfer areas;<sup>44</sup>

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<sup>32</sup> See General Permit, Part II.A.1.

<sup>33</sup> See General Permit, Part II.A.2.

<sup>34</sup> See General Permit, Part IV.A.1

<sup>35</sup> See General Permit, Part IV.A.1

<sup>36</sup> See General Permit, Part IV.A.2

<sup>37</sup> See General Permit, Part IV.B.1.

<sup>38</sup> See General Permit, Part IV.B.1-4.

<sup>39</sup> See General Permit, Part IV.F.

<sup>40</sup> See General Permit, Part IV.F.3 (requiring at least semi-annual collection and analysis of stormwater samples).  
<sup>See General Permit, Part IV.F.2 obligations to sample more frequently.</sup>

<sup>41</sup> See General Permit, Part IV.F.2.

<sup>42</sup> See General Permit, Part IV.F.1.d and Part IV.F.2.

<sup>43</sup> See General Permit, Part IV.F.1.e and Part IV.F.2.

- Document storm events during which any samples are taken;<sup>45</sup>
- Document all of these monitoring activities;<sup>46</sup>
- Keep records of the monitoring with the Facility's SWPPP;<sup>47</sup> and
- Submit an annual report to DEC accompanied by a Discharge Monitoring Report detailing the results of any required stormwater samples, as well as reports that documents any instance of non-compliance with benchmarks or numeric effluent limitations.<sup>48</sup>

We are not necessarily aware of all industrial activities taking place at the Facility. To the extent that industrial activities other than the above are carried out at the Facility, other sampling may be required as well.<sup>49</sup> This notice provides Arctic Glacier with sufficient information to identify the standards and limitations that apply to all categories of industrial activity.

Arctic Glacier has failed to conduct the required annual and other routine inspections, monitoring, and testing, as required by, at least, Parts III, IV, and VII of the General Permit. Arctic Glacier also has failed to retain records and submit monitoring reports to DEC, as required by, at least, Parts IV and VII of the General Permit.

4. Arctic Glacier has failed to comply with additional requirements located in Part VII of the General Permit.

As noted above, the General Permit contains various requirements specific to Sector U. These requirements, some of which are referenced above, are collected in Part VII of the General Permit. They include:

- In addition to the general non-stormwater prohibition in Paragraph I.D.1, the following discharges not covered by this permit include, but are not limited to:
  - Boiler blow down;
  - Cooling tower overflow and blow down;
  - Ammonia refrigeration purging; and
  - Vehicle washing/clean-out operations.<sup>50</sup>
- The SWPPP site map shall identify the locations of the following activities if they are exposed to precipitation/surface runoff:
  - Vents/stacks from cooking, drying, and similar operations;
  - Dry product vacuum transfer lines;
  - Animal holding pens;
  - Spoiled product; and

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<sup>44</sup> See General Permit, Part IV.B.1.f.

<sup>45</sup> See General Permit, Part IV.D.

<sup>46</sup> See generally Part IV.F.3.

<sup>47</sup> See General Permit, Part III.A.8.

<sup>48</sup> See General Permit, Part VI.A.

<sup>49</sup> See General Permit, Part VII.

<sup>50</sup> See General Permit, Part VII, Sector U.



- Broken product container storage areas.<sup>51</sup>
- In addition to food and kindred products processing-related industrial activities, the plan must also describe application and storage of pest control chemicals (e.g., rodenticides, insecticides, fungicides, etc.) used on plant grounds.<sup>52</sup>
- At a minimum, the following areas, where the potential for exposure to stormwater exists, must be inspected:
  - Loading and unloading areas for all significant materials;
  - Storage areas, including associated containment areas;
  - Waste management units;
  - Vents and stacks emanating from industrial activities;
  - Spoiled product and broken product container holding areas;
  - Animal holding pens;
  - Staging areas; and
  - Air pollution control equipment.<sup>53</sup>
- The employee training program must also address pest control.<sup>54</sup>

More obligations may apply where the receiving water is impaired.

Arctic Glacier's activities are included in the definition of industrial activity to which the CWA applies. Therefore, Arctic Glacier must obtain coverage under and comply with the requirements of the General Permit, including those specific to Arctic Glacier's industrial activities, as described in Part VII and outlined above. Arctic Glacier has failed to obtain coverage under the General Permit and comply with these additional requirements.

5. Arctic Glacier is clearly violating the Clean Water Act.

In sum, Arctic Glacier's discharge of stormwater associated with industrial activities without a permit, Arctic Glacier's failure to apply for permit coverage, and Arctic Glacier's failure to comply with the above-listed conditions of the General Permit (or an individual SPDES permit) constitute violations of the General Permit and of sections 301(a) and 402(p) of the CWA.

### III.

#### **PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS**

Arctic Glacier is the person, as defined by section 502(5) of the CWA, responsible for the violations alleged in this Notice. Arctic Glacier has operational control over the day-to-day

<sup>51</sup> See General Permit, Part VII, Sector U.

<sup>52</sup> See General Permit, Part VII, Sector U.

<sup>53</sup> See General Permit, Part VII, Sector U.

<sup>54</sup> See General Permit, Part VII, Sector U.

industrial activities at this Facility. Therefore, Arctic Glacier is responsible for managing stormwater at the Facility in compliance with the CWA. We hereby put Arctic Glacier on notice that if we subsequently identify additional persons as also being responsible for the violations set forth above, we intend to include those persons in this action.

#### IV.

##### **LOCATION OF THE ALLEGED VIOLATION**

The violations alleged in this Notice have occurred and continue to occur at the Facility located at 225 Lake Street, Newburgh, New York 12550. During precipitation events, stormwater polluted by the facility rushes off the property and discharges directly into the ponds at Little Falls Park, Muchattaogs Lake, and/or Quassaic Creek untreated. The failure to develop and implement pollution prevention plans and take the other required measures are violations occurring at the Facility in general and in the inadequate documents themselves.<sup>55</sup>

#### V.

##### **DATES OF VIOLATION**

Every day upon which Arctic Glacier has failed to apply for permit coverage since Arctic Glacier first commenced operations at the Facility and discharged polluted stormwater is a separate violation of section 301(a) of the CWA and EPA's regulations implementing the CWA.<sup>56</sup>

Additionally, Arctic Glacier has discharged pollution without a permit in violation of section 301(a) of the CWA on every day since Arctic Glacier commenced operations at the Facility on which there has been a measurable precipitation event or discharge of previously accumulated precipitation (i.e., snowmelt) over 0.1 inches.

Finally, if Arctic Glacier seeks permit coverage after receiving this letter but fails to fully comply with the requirements of the General Permit (or an individual permit), each day upon which Arctic Glacier claims coverage under a SPDES permit but fails to comply with that permit will constitute a separate day of violation with respect to each unmet condition of that permit.

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<sup>55</sup> The federal courts have held that a reasonably specific indication of the area where violations occurred, such as the name of the facility, is sufficient and that more precise locations need not be included in the notice. See, e.g., *Natural Resources Defense Council v. Southwest Marine, Inc.*, 945 F. Supp. 1330, 1333 (S.D. Cal. 1996), aff'd 236 F.3d 985, 996 (9th Cir. 2000); *City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995); *United Anglers v. Kaiser Sand & Gravel Co.*, No. C 95-2066 CW, 1995 U.S. Dist. LEXIS 22449 at \*4 (N.D. Cal. Sept. 27, 1995)

<sup>56</sup> See also 33 U.S.C. §§ 402(p)(3)(A) and (p)(4)(A) (requiring the establishment of industrial stormwater NPDES permits and of a permit application process).



Arctic Glacier is liable for the above-described violations occurring prior to the date of this letter, and for every day after the date of this letter that these violations continue. In addition to the violations set forth above, this Notice covers all violations of the CWA evidenced by information that becomes available to us after the date of this Notice of Intent to File Suit.<sup>57</sup> These violations are ongoing, and barring full compliance with the permitting requirements of the Clean Water Act, these violations will continue.

## VI.

### RELIEF REQUESTED

First, we will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to sections 505(a) and (d) and such other relief as permitted by law. We will seek an order from the Court requiring Arctic Glacier to obtain SPDES permit coverage and to correct all other identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Second, pursuant to section 309(d) of the CWA,<sup>58</sup> each separate violation of the CWA subjects Arctic Glacier to a penalty not to exceed \$37,500 per day for each violation that occurred after January 12, 2009.<sup>59</sup> We will seek the full penalties allowed by law.

Third and lastly, pursuant to section 505(d) of the CWA, we will seek recovery of their litigation fees and costs (including reasonable attorney and expert witness fees) associated with this matter.

## VII.

### PERSONS GIVING NOTICE

The full name, address, and telephone number of the persons giving notice are as follows:

Riverkeeper, Inc.  
20 Secor Road  
Ossining, NY 10562  
(914) 422-2133  
Attn: Michael Dulong

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<sup>57</sup> See, e.g. *Public Interest Research Grp. v. Hercules, Inc.*, 50 F.3d 1239, 1248-49 (3d Cir.1995) (a notice that adequately identifies specific violations to a potential defendant also covers repeated and related violations that the plaintiff learns of later. "For example, if a permit holder has discharged pollutant 'x' in excess of the permitted effluent limit five times in a month but the citizen has learned only of four violations, the citizen will give notice of the four violations of which the citizen then has knowledge but should be able to include the fifth violation in the suit when it is discovered.")

<sup>58</sup> 33 U.S.C. § 1319(d); see also 40 C.F.R. § 19.4 (Adjustment of Civil Monetary Penalties for Inflation).

<sup>59</sup> 40 C.F.R. § 19.2.

## VIII.

### IDENTIFICATION OF COUNSEL

Notifier is represented by legal counsel in this matter. The name, address, and telephone number of Notifier's attorneys are:

Pace Environmental Litigation Clinic, Inc.  
Elisabeth Haub School of Law  
78 North Broadway  
White Plains, NY 10603  
(914) 422-4343  
Attn: Todd Ommen

## IX.

### CONCLUSION

The foregoing provides more than sufficient information to permit Arctic Glacier to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.<sup>60</sup>

If Arctic Glacier has developed a SWPPP, we request that Arctic Glacier send a copy to the undersigned attorney.<sup>61</sup> Otherwise, we encourage Arctic Glacier to begin developing a SWPPP immediately after receiving this letter and ask that Arctic Glacier please inform the undersigned attorney of Arctic Glacier's efforts so that we can work with Arctic Glacier to avoid disputes over the contents of the SWPPP.<sup>62</sup>

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<sup>60</sup> 40 C.F.R. § 135.3(a).

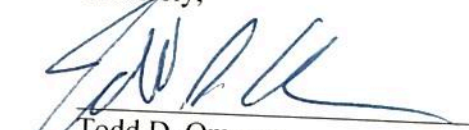
<sup>61</sup> Note that under Part III.C.2 of the General Permit, the owner or operator of a facility "must make a copy of the SWPPP available to the public within fourteen (14) days of receipt of a written request."

<sup>62</sup> We will not send a new notice letter in response to any effort Arctic Glacier makes to come into compliance with the Clean Water Act after receiving this letter, for example, by developing a SWPPP. The federal courts have held that citizens sending a notice letter are not required to identify inadequacies in compliance documents that do not yet exist and are "not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [a defendant's] post-notice compliance efforts." *WaterKeepers N. Cal. v. AG Indus. Mfg.*, 375 F.3d 913, 920 (9th Cir. 2004). See also *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000) ("subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant. The defendant's later changes . . . do not retroactively divest a district court of jurisdiction under 33 U.S.C. § 1365(b)."); *City of New York v. Anglebrook L.P.*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995) (plaintiff's notice letter based on inadequacies of defendant's original SWPPP held sufficient to establish court's jurisdiction, even though defendant later prepared a revised SWPPP).

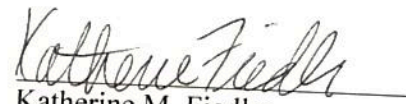


During the sixty (60) day notice period, we are willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of protracted litigation. If Arctic Glacier wishes to pursue such discussions, please contact the undersigned attorney immediately so that negotiations may be completed before the end of the sixty (60) day notice period. We do not intend to delay the filing of a complaint in federal court, regardless of whether discussions are continuing at the conclusion of the sixty (60) days.

Sincerely,



Todd D. Ommen  
Managing Attorney



Katherine M. Fiedler  
Legal Intern

cc:

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